TAN ENG JOO v. SANDEEP SINGH GREWAL & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
LIZA CHAN SOW KENG JC
[ORIGINATING SUMMONS NO: WA-24NCC-177-04-2021]
30 MARCH 2022

Abstract – *A shareholder may bring both personal action and leave application to commence a derivative action in the same suit if both claims revolve around the same facts, transactions and events. This will obviate the necessity of separate trials, hearings, costs and save the court's resources.*

COMPANY LAW: *Derivative action – Leave – Derivative action by shareholder on behalf of company against sole director of company – Personal capacity – Allegations of corporate wrongs by sole director committed against company – Whether shareholder can combine application to seek leave to commence derivative action with his personal causes of action suit against sole director and company – Whether there was reasonable cause of action in proposed action based on alleged complaints – Companies Act 2016, s. 347(1)*

The plaintiff and the first defendant were the shareholders of the second defendant, Subhome Management Sdn Bhd ('company'). In this originating summons ('OS'), the plaintiff sought leave pursuant to s. 347(1) of the Companies Act 2016 ('CA') to commence a derivative action ('proposed action') on behalf of the company against the sole director of the company, the first defendant, for corporate wrongs committed against the company as well as sued in his personal capacity as a shareholder for expropriation of his shares. The wrongdoings of the first defendant, as asserted by the plaintiff, were: (i) failing to exercise and discharge his duty as the director of the company with reasonable care, skill and diligence in the best interests of the company to the extent that a judgment in default of appearance was entered against the company; (ii) denying the plaintiff access to three years of the company's financial reports despite requests by the plaintiff, in breach of ss. 257 and 258 of the CA; (iii) failing, defaulting and neglecting his duty as an officer/director to lodge financial reports of the company with the registrar since June 2019, in breach of s. 259 of the Act; (iv) convening an illegal and unlawful extraordinary general meeting ('EGM') without proper and valid notice, without legitimate authority, without proper and adequate quorum and without the attendance of the company secretary, in contravention of the shareholders' agreement ('SA') and in blatant disregard of various provisions of the CA; (v) attempting to disguise the EGM as a 'first round bidding process', purportedly convened pursuant to an alleged deadlock situation under cl. 11 of the SA when there was no deadlock as

A defined in the SA; (vi) under the guise of a share bidding exercise conducted, illegally, unlawfully and fraudulently transferring the plaintiff's shares in the company; and (vii) dishonestly arranging for an imposter to masquerade as a proxy of the plaintiff during the EGM. The issues that arose were: (i) whether the plaintiff can combine his application to seek leave to
B commence a derivative action with his personal causes of action in this OS against the defendants; and (ii) whether there was reasonable cause of action in the plaintiff's proposed action based on the alleged complaints.

Held (declining leave for proposed action but granting relief in respect of plaintiff's complaints as shareholder):

C **(1)** There was nothing wrong in the instant proceedings for the plaintiff to bring both personal action and leave application to commence a derivative action in the same OS as it was not in dispute that both claims predominantly revolved around the same facts, transactions and events. In addition, this will obviate the necessity of separate trials, hearings,
D costs and save the court's resources particularly when the courts are heavily burdened. (para 25)

(2) The real injury that the plaintiff sought to vindicate was the wrong done to him in the main complaint – in the transfer of his shares at the so-
E called illegal EGM, which was not a wrong done to the company. The personal injury to him did not provide a sufficient basis for him to bring the matter within s. 348 of the CA. (para 28)

(3) The plaintiff's request for financial reports were made after the commencement of this proceeding. Clearly, the plaintiff had not shown,
F as was incumbent on him so to do, that he had given the Board of Directors (notwithstanding the first defendant in this case was the sole director of the company) an opportunity to consider whether the action ought to be taken against the wrongdoer in respect of the grievances which were the basis of the derivative action. The plaintiff, without
G doing so, had failed to put his foot into the door and such failure to show wrongdoer control prevented action being taken was fatal and incurable. There was no case here that warranted further investigation in a full derivative action. In addition, these were in reality mismanagement issues and not misconduct. The possibility of the company being fined remained speculative. A derivative action cannot be predicated on
H mismanagement. The court will not interfere with the internal management and affairs of a company. The application seeking leave to commence derivative action was incompetent and not properly constituted as the threshold was not met. (paras 29, 30 & 32)

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(4) For a notice to be issued under cl. 11.2(b) of the SA to convene the first-round bidding process pursuant to an alleged deadlock under cl. 11 of the SA, there must first be established a deadlock, which necessitate the compliance of cl. 11.1(a) or (b) as well as cl. 11.1(a) or (b) as well as cl. 11.2(a). The first defendant's notices calling for the meeting allegedly arose from a deadlock notice issued to the shareholders. For reasons only known to the first defendant, the deadlock notice was not produced. The first defendant had not demonstrated compliance of cls. 11.1(a) or (b) and 11.2(a) at all. *Sans* compliance with these clauses, the 'deadlock' as defined in the SA had not been proven on a balance of probability. As such, the deadlock notice was utterly misconceived. (para 40)

(5) The meeting held, whether called an EGM or as a first-round bidding process, was invalid. The plaintiff was to return the sum of RM1,500 banked into the plaintiff's account to the first defendant within 14 days of this order. (para 49)

Case(s) referred to:

Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 4 CLJ 551 CA ***(refd)***
Burland v. Earle [1902] AC 83 ***(refd)***
Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak [2010] 7 CLJ 808 CA ***(refd)***
Datuk Syed Kechik Syed Mohamed v. Government Of Malaysia & Anor [1978] 1 LNS 44 FC ***(refd)***
Foss v. Harbottle [1843] 67 ER 189 ***(refd)***
General Council Of Medical Education And Registration Of The United Kingdom v. Spackman [1943] 2 All ER 337 ***(refd)***
Ho Yew Kong v. Sakae Holdings Ltd [2018] SGCA 33 ***(refd)***
Koh Jui Hiong & Ors v. Ki Tak Sang & Another Appeal [2014] 2 CLJ 401 FC ***(refd)***
Lim Eng Kay v. Jaafar Mohamed Said [1982] CLJ 298; [1982] CLJ (Rep) 190 FC ***(refd)***
Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd [1999] 2 CLJ 997 FC ***(refd)***
Mak Siew Wei v. Yeoh Eng Kong & Other Appeals [2019] 7 CLJ 470 CA ***(refd)***
Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor [1996] 4 CLJ 716 FC ***(refd)***
Perak Integrated Networks Services Sdn Bhd v. Urban Domain Sdn Bhd & Anor [2018] 5 CLJ 513 FC ***(refd)***
Ranjeet Singh Sidhu & Anor v. Zavarco Plc & Ors [2016] 2 CLJ 975 HC ***(refd)***
Sinar Wang Sdn Bhd v. Ng Kee Seng [2004] 3 CLJ 679 CA ***(refd)***
Swansson v. RA Pratt Properties Pty Ltd & Anor [2002] NSWSC 583 ***(refd)***
Waddington Ltd v. Chan Chun Hoo Thomas & Ors [2008] 4 HKCU 1381 ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 181A, 181B
Companies Act 2016, ss. 257, 258, 259, 346, 347(1), (3), 348(4)(a), 350

Companies Act [Sing], s. 216A(3)

For the plaintiff - Jasbeer Singh Banta Singh, Nur Afifah Mat Swadi & Kevin Siaw; M/s Jasbeer Nur & Lee
For the defendants - Kevin Prakash & Hazween Sameera Md Hassan; M/s Kevin Prakash

Reported by Lina E

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JUDGMENT

Liza Chan Sow Keng JC:

Introduction

[1] The plaintiff by the originating summons ("OS"), sought leave pursuant to s. 347(1) of the Companies Act 2016 ("CA 2016") to commence a derivative action ("the proposed action") on behalf of Subhome Management Sdn. Bhd. (interchangeably referred as "the second defendant" or "company") against the sole director of the company named as the first defendant for corporate wrongs committed against the company as well as sued in his personal capacity as a shareholder for expropriation of his shares.

[2] On 10 January 2022, this court declined leave to for the proposed action but granted relief in respect of the plaintiff's complaints in his capacity as a shareholder. Dissatisfied, both plaintiff and defendants have appealed against the decision. These are the reasons for my decision.

Background

[3] The company was incorporated on 5 August 2013 and carries on the business of property management.

[4] The plaintiff and the first defendant are shareholders of the company with the plaintiff owning 121,250 shares.

[5] The first defendant as the sole director of the company oversees the day-to-day management and operations of the company.

[6] The plaintiff in summary asserted the first defendant's wrongdoings as follows:

(i) The first defendant being the director of the company have breached his fiduciary and statutory duties owed to the company and him on the following grounds:

(a) The first defendant failed to exercise and discharge his duty as the director of the company with reasonable care, skill and diligence in the best interests of the company to the extent that a judgment in default of appearance dated 15 September 2020 was entered against the company;

(b) The first defendant denied the plaintiff access to three years of the company's financial reports *ie*, 2018, 2019 and 2020 despite repeated oral and written requests from the plaintiff and thereby breached s. 257 and s. 258 of the Companies Act 2016 ("the Act"). These sections *inter alia* provide that every company shall send a copy of its financial statements and reports for each financial year to every member of the company within six

months of its financial year end; and by failing to do so has exposed the company to a punishable and continuing offence under the Act which upon conviction might cause the company a maximum fine of RM50,000 for each conviction;

(c) The first defendant failed, defaulted and neglected his duty as an officer/director to lodge financial reports of the company with the Registrar since June 2019, in breach of s. 259 of the Act which requires the company within 30 days from the financial statements and reports are circulated to its members under s. 258 to lodge the same with the Registrar;

(ii) The first defendant had convened an illegal and unlawful extraordinary general meeting ("EGM") of the company on 14 May 2020 without any proper and valid notice, without legitimate authority, without proper and adequate quorum, without the attendance of the company secretary, in contravention of the shareholder's agreement dated 25 May 2018 ("SHA") and in blatant disregard and breach of various provisions of the Act;

(iii) The first defendant attempted to disguise the illegal and unlawful EGM as a "first round bidding process" purportedly convened pursuant to an alleged deadlock situation under cl. 11 of the SHA when there was no deadlock as defined in the SHA;

(iv) Under the guise of a share bidding exercise conducted on 14 May 2020, illegally, unlawfully and fraudulently transferred the plaintiff's shares in the company;

(v) The first defendant dishonestly arranged for an imposter by the name Aravind Sinniah to masquerade as a proxy of the plaintiff during the illegal EGM when in fact the plaintiff was not aware of the EGM and do not even know who Aravind Sinniah is;

(vi) The plaintiff has fulfilled all the requirements under s. 348 of the Act for leave to commence derivative action against the first defendant on behalf of the company;

(vii) The plaintiff is entitled to file (a) a personal shareholder claim; and (b) a derivative action in a single suit by way of encl. 1 as both claims arose from the same facts, transactions and events, citing in support the Court of Appeal case of *Mak Siew Wei v. Yeoh Eng Kong & Other Appeals* [2019] 7 CLJ 470; and

(viii) Filing two separate suits will lead to multiplicity of action.

A **The Defendants' Case**

[7] The defendant's contentions in opposing the OS in summary are:

(i) The plaintiff is not entitled to leave to commence derivative proceedings against the defendants as the complaints made (which are denied) are not corporate wrongs committed against the company; the plaintiff's complaints are but complaints in his personal capacity as a shareholder of the company, of matters arising from the SHA:

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(a) The entire set of complaints or grievance rests on events that unfolded during the first-round bidding process on 14 May 2020 which was convened by the first defendant for the shareholders to purchase shares under the mechanism prescribed in the SHA made between parties;

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(b) The plaintiff's grievance is that the first defendant had wrongfully exercised his rights under the SHA or failed to comply with the procedure set out in the SHA is at best an allegation of a breach of the SHA (which in any event is denied) and is not a cause which affects the company;

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(c) There was no alleged EGM convened by the first defendant in his capacity as the Director on 14 May 2020 which is said to have contravened the requirements under the Act, the meeting was in fact a first-round bidding process under the SHA;

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(d) The purported absence of notice to convene the EGM on 14 May 2020 does not arise as there was no EGM of the company at all. The notice was in respect of the first-round bidding process under the SHA;

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(e) The purported lack of quorum at the EGM on 14 May 2020 does not arise as there was no EGM of the company at all. The alleged lack of quorum was in respect of the first-round bidding process under the SHA;

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(f) The purported absence of a legitimate company secretary at the EGM on 14 May 2020 does not arise as the meeting was a first-round bidding process under the SHA;

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(g) The first defendant had purportedly falsified a proxy for the plaintiff without the consent of the plaintiff; and

(h) The firs- round bidding process held in the EGM was invalid.

(ii) The purportedly falsified proxy for the plaintiff without the consent of the plaintiff; and the allegation of the first-round bidding process held in the EGM was invalid have no merits as there was never an EGM to begin with. The first defendant issued a notice to convene a first-round bidding process on 14 May 2020 in accordance with cl. 11 of the SHA;

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(iii) Even if the meeting was an EGM (which is denied), it was convened in full compliance of cl. 8.1(c) the SHA which provide that the company may summon an EGM by giving not less than 14 days' notice to the shareholders;

(iv) The plaintiff is aware from its then solicitors' letter dated 28 May 2020 that there was no EGM but instead a first-round bidding process all along;

(v) If at all, the plaintiff's complaints at best, relate to mismanagement and not misconduct; derivative actions are to provide a remedy for misconduct which the plaintiff has not established; and

(vi) The instant OS is an abuse of process, not made in good faith and/or not for the best interest of the company.

Law And Court's Findings

[8] For convenience, s. 347, s. 348 and s. 350 of the CA 2016 are produced:

Section 347 – Derivative proceedings

(1) A complainant may, with the leave of the Court initiate, intervene in or defend a proceeding on behalf of the company.

(2) Proceedings brought under this section shall be brought in the company's name.

(3) The right of any person to bring, intervene in, defend or discontinue any proceedings on behalf of a company at common law is abrogated.

Section 348 Leave of Court

(1) An application for leave of the Court under section 347 shall be made to the court without the need for an appearance to be entered.

(2) The complainant shall give thirty days' notice in writing to the directors of his intention to apply for the leave of Court under section 347.

(3) Where leave has been granted for an application under section 347, the complainant shall initiate proceedings in Court within thirty days from the grant of leave.

(4) In deciding whether or not leave shall be granted, the Court shall take into account whether:

(a) the complainant is acting in good faith; and

(b) it appears *prima facie* to be in the best interest of the company that the application for leave be granted.

A (5) Any proceedings brought, intervened in or defended under this section shall not be discontinued, compromised or settled except with the leave of the Court.

Section 350 Powers of the Court

In granting leave under this section and sections 347 and 348, the Court B may make such other orders as the Court thinks appropriate including an order:

(a) authorising the complainant or any other person to control the conduct of the proceedings;

C (b) giving directions for the conduct of the proceedings;

(c) for any person to provide assistance and information to the complainant, including to allow inspection of the company's books;

(d) requiring the company to pay reasonable legal fees and disbursements incurred by the complainant in connection with the D application or action, or pending the grant of the leave or pending the grant of any injunction by the Court hearing the application for leave under this section; or

(e) the costs of the complainant, the company or any other person for proceedings taken under this section, including an order as to indemnity for costs.

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[9] Section 181A and s. 181B of the Companies Act 1965 ("CA 1965") are the same as s. 347 and s. 348 of the Act except that under s. 347(3) of the Act, the common law right to bring, intervene in, defend or discontinue proceedings on behalf of a company is expressly abrogated. Section 181B(4) F is similar to s. 216A(3) of the Companies Act Singapore. This will become relevant when considering the cases decided under s. 181A and 181B of CA 1965 such as *Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak* [2010] 7 CLJ 808; [2011] 3 MLJ 636 and the Singapore case of *Ang Thiam Swee*.

[10] I should briefly explain what a derivative action is.

G **[11]** In *Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 4 CLJ 551; [1995] 3 MLJ 417 Gopal Sri Ram JCA (later FCJ) said:

> *We begin with the rule in Foss v. Harbottle* (1843) 67 ER 189. *The rule has two limbs.* The first limb of the rule and the present appeal has nothing to do with its application is that a court will not interfere with the internal H workings of a corporation upon a matter which is capable of being ratified by a majority of shareholders present and voting at a general meeting of the company.
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> *The second limb of the rule is of much wider purport and is universal in its application. It is based upon the doctrine that only he who has been injured may* I *sue. Translated into company law, the proposition may be stated thus. If a wrong*

has been done to a company, then it is the company which is the proper plaintiff in an action brought to redress the injury. An individual shareholder or even a group of shareholders forming a majority on the floor of a general meeting of the company have no locus standi to bring an action to remedy a wrong done to a company.

We now turn to consider the one exception with which this case is concerned. *It is the derivative action; an ingenious procedural device created by courts of equity; by which the rule of judicial non-interference is overcome. It is based upon the premise that the company which has been wronged is unable to sue because the wrongdoers are themselves in control of its decision-marking organs and will not, for the reason, permit an action to be brought in its name.* In these circumstances, a minority shareholder may bring an action on behalf of himself and all the others as the defendants. The wrongdoers must be cited as the defendants. So too must the company. (emphasis added)

[12] In simple terms, where a company has been wronged, but is incapacitated from taking action by wrongdoers having control of the company, a derivative action enables a minority shareholder to bring action on behalf of the company to obtain redress for the wrongs as an exception to the "proper plaintiff rule" laid down in *Foss v. Harbottle* [1843] 67 ER 189 which is founded on the fundamental principle that a company is a legal entity separate and distinct from its members.

[13] The Federal Court in *Perak Integrated Networks Services Sdn Bhd v. Urban Domain Sdn Bhd & Anor* [2018] 5 CLJ 513; [2018] 4 MLJ 1 explained as follows:

[48] Thus, where the wrongdoers are in control of the company such that the company is incapacitated from bringing an action, the court would allow an action to be brought by individual shareholders on behalf of the company to obtain redress. The exception was a 'mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress' (*Burland v. Earle* [1902] AC 83 (PC) at p 93). This exception, which came to be known as a 'fraud on the minority', was explained by the English Court of Appeal in *Edwards and Another v. Halliwell and Others* at 1067:

> It has been further pointed out that where what has been done amounts to what is generally called in these cases a fraud on the minority and the wrongdoers are themselves in control of the company, the rule is relaxed in favour of the aggrieved minority who are allowed to bring what is known as a minority shareholders' action on behalf of themselves and all others. *The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue. Those exceptions are not directly in point in this case, but they show, especially the last one, that the rule is not an inflexible rule and it will be relaxed where necessary in the interests of justice.* (emphasis added)

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> [49] This type of action was given the name 'derivative action', in view of its true nature that individual members are suing on behalf of the company to enforce rights derived from it (*Wallersteiner v. Moir (No 2)*; *Moir v. Wallersteiner and others (No 2)* at p 391).

[14] Section 348(4) mandates the court in deciding whether or not to grant
B leave to take into account whether:

(i) the complainant is acting in good faith; and

(ii) it appears *prima facie* to be in the best interest of the company that the application for leave be granted.

C **[15]** That leave is not to be given lightly is made clear by the Court of Appeal in *Celcom (M) Bhd v. Mohd Shuaib Ishak* (*supra*) where the High Court's decision in granting leave to the complainant was overturned. Abdull Hamid Embong JCA (as His Lordship then was) in delivering judgment of the Court of Appeal cited *Swansson v. RA Pratt Properties Pty Ltd & Anor* [2002] NSWSC
D 583. This is because the relief sought is final and the leave application is not interlocutory in nature. The relevant passage of judgment by the Court of Appeal is reproduced below:

> [8] … The intention of ss. 181A-181E of the CA is to enable a member, present or past, to seek leave to bring an action in the name of the
E company to recover losses sustained by that company. *As such, leave to bring a derivative action must not be given lightly* (see *Swansson v. RA Pratt Properties Pty Ltd & Anor* [2002] NSWSC 583). Thus, once leave is granted the defendants in this case cannot revisit the issue on the grant of leave. *Granting leave is therefore final in that sense and not interlocutory in character.* In this respect, the learned judge was wrong in stating cursorily that the
F matter before him was 'only an application for leave' and relying on the low threshold used under O. 53 of the RHC (application for judicial review) ie to determine if an application for judicial review is not frivolous or vexations by relying on cases like Clear Water. *The learned judge must as a matter of judicial prudence exercise a greater caution in satisfying himself that the requirements under s. 181A of the CA are met. A low threshold of merely*
G *determining if there existed a prima facie case is therefore a wrong basis for granting the leave. There needs to be a strict interpretation of s. 181A of the CA, and compliance to those statutory requirements* (see *Charlton v. Baber* (2003) 21 ACLC 1671). (emphasis added)

[16] In this case, the defendants' counsel has postulated that the alleged
H wrongdoings are not to the company but are alleged wrongdoings personal to the plaintiff *qua* member which at best, he added, amount to mismanagement which is not a ground for derivative proceedings.

[17] This postulation to me, is of crucial importance as the Act provides a separate and distinct remedy for corporate wrongs by way of a statutory
I derivative action, found in ss. 347 and 348 of the Act where the proper party

to sue is the company and when the company is unwilling to bring an action, any member of the company can bring such an action on behalf of the company by way of derivative action by first invoking the leave of court as a safeguard against frivolous claims. Where the wrong is done to the member, such member can bring an action in his own right personally.

[18] To illustrate the point, Lord Millet sitting in the Court of Final Appeal in Hong Kong in *Waddington Ltd v. Chan Chun Hoo Thomas & Ors* [2008] 4 HKCU 1381, explained at para. [77]:

> But while there is some overlap between such proceedings and the derivative action they serve essentially different functions. Unfair prejudice proceedings are concerned to bring mismanagement to an end; derivative actions are concerned to provide a remedy for misconduct: see *Re Charnley Davies Ltd (No 2)* [1990] BCLC 760; *Re Chime Corp Ltd* (2004) 7 HKCFAR 546. While the court may have jurisdiction in the strict sense on a petition under s 168A to order payment of compensation to the company, the derivative action is the proper vehicle for obtaining such relief where the plaintiff's complaint is of misconduct rather than mismanagement: see *Re Chime Corp Ltd* (2004) 7 HKCFAR 546 at 571.

[19] Directors' breach of their fiduciary and statutory duties is a misconduct and a wrong done against the company and not the shareholders. The distinctions between "mismanagement" and "misconduct" and the relief that avail as such whether for an oppression action under s. 346 or a derivative action under s. 347 of the CA 2016 as the case may be were explained in Federal Court in *Koh Jui Hiong & Ors v. Ki Tak Sang & Another Appeal* [2014] 2 CLJ 401; [2014] 3 MLJ 10 where Jeffrey Tan FCJ stated:

> [25] … In my judgment the distinction between misconduct and … (mismanagement) does not lie in the particular acts or omissions of which the complaint is made, but in the nature of the complaint and the nature of the remedy necessary to meet it … If the whole gist of the complaint lies in the unlawfulness of the acts or omissions complained of, so that it may be adequately redressed by the remedy provided by law for the wrong, the conduct is one of misconduct simpliciter (*Re Charnley Davis Ltd (No 2)* [1990] BCLC 760, per Millett J). Damages were awarded to CH for misconduct towards it, which was actionable by CH itself, by a derivative action (see *Re Charnley Davis Ltd (No 2)* [1990] BCLC 760, where Millett J, as he then was, concluded that where the essence of the claim was not mismanagement but consisted of breaches of duty or other misconduct actionable by the company itself, the proper vehicle for relief was a derivative action; and *A R Evans Capital Partners Limited v. Gen2 Partners Inc* [2012] HKCU 1284, where Barma J held that where the claims concern misconduct, they belong to a derivative action).
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> …

A [55] There is a limit to the extent to which s. 181 could be used to outflank the rule in *Foss v. Harbottle*. The order to be made must be made with a view to bringing an end or remedying the matters complained of under s. 181. The derivative action elements should be an incident of the matters complained of under s. 181. It would be an abuse of s. 181 where the nature of the complaint was misconduct rather than mismanagement (see
B *Re Chime Corporation* per Lord Scott). 'To allow corporate claims to be pursued *via* the oppression remedy would effectively denude the statutory derivative action of much of its intended effect' (*A Reconsideration of the Shareholder's Remedy for Oppression in Singapore* by Pearlie M C Koh, CLWR 42 1(61) 1 March 2013) ...

C **[20]** In *Ho Yew Kong v. Sakae Holdings Ltd* [2018] SGCA 33, the Singapore Court of Appeal in drawing a distinction between a real injury that the plaintiff had suffered, as opposed to an injury to the company and where the acts complained off overlap and feature both personal wrongs against the shareholder and corporate wrongs against the company, enunciated the
D following principles:

(i) where an act of oppression features both personal wrongs against the shareholder and corporate wrongs against the company, the court needs to consider the real injury that is complained of and the essential remedy that is sought in ascertaining whether a minority oppression claim
E brought is an abuse of process;

(ii) director's breach of his duty of care, skill and diligence in monitoring the management of his company's affairs would amount to oppression only if the negligent mismanagement is sufficiently serious; and

F (iii) a shareholder who complains of oppression may be precluded from seeking relief under s. 346 where it has an alternative remedy that is both appropriate and adequate to bring to an end the matters complained of.

[21] The Singapore Court of Appeal laid down the following analytical
G framework as a guide where the facts present both personal wrongs and corporate wrongs:

(i) injury:

(a) what is the real injury that the plaintiffs seek to vindicate?; and

H (b) is that injury distinct from the injury to the company and does it amount to commercial unfairness against the plaintiff?

(ii) remedy:

(a) what is the essential remedy that is being sought and is it a remedy
I that meaningfully vindicates the real injury that the plaintiffs have suffered?; and

(b) is it a remedy that can only be obtained under s. 346 of the Companies Act?

[22] I now consider the issues in the OS, namely:

(i) whether the plaintiff can combine his application to seek leave to commence a derivative action with his personal causes of action in this OS against the defendants;

(ii) whether there is a reasonable cause of action in the plaintiff's proposed action based on the alleged complaints?

(iii) whether the plaintiff is acting in good faith and whether the proposed action is *prima facie* in the best interests of the company as required by s. 348(4)? and

(iv) is the plaintiff entitled to any relief?

Issue 1: Whether The Plaintiff Can Combine His Application To Seek Leave To Commence A Derivative Action With His Personal Causes Of Action In This OS Against The Defendants

[23] In deciding this issue, I would rely on the first Malaysian case on this subject. In *Ranjeet Singh Sidhu & Anor v. Zavarco Plc & Ors* [2016] 2 CLJ 975; [2015] MLJU 638, where both personal and derivative actions were brought in one suit, Wong Kian Kheong JC (as His Lordship then was) held, *inter alia*, as follows:

> [34] I have not overlooked the fact that the Plaintiffs have combined a double derivative action with personal causes of action in This Suit against all the defendants in this case. I am not able to find any Malaysian case on this point. I am of the opinion that RC does not prohibit such a course adopted by the Plaintiffs in this case. I refer to Order 15 rules 4(1), 5(1) and 6(1) RC as follows:
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> 4(1) *Subject to rule 5(1), two or more persons may be joined together in one action as plaintiffs or defendants with the leave of the Court or where:*
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> *(a) if separate actions were brought by or against each of them, as the case may be, some common question of law or fact would arise in all the actions; and*
>
> *(b) all rights to relief claimed in the action (whether they are joint, several or alternative) are in respect of or arise out of the same transaction or series of transactions.*
>
> 5(1) *If claims in respect of two or more causes of action are included by a plaintiff in the same action or by a defendant in a counterclaim, or if two or more plaintiffs or defendants are parties to the same action, and it appears to the Court that the joinder of causes of action or of parties, as the case may be, may embarrass or delay the trial or is otherwise inconvenient, the Court may order separate trials* or make such other order as may be expedient.
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> 6(1) *A cause or matter shall not be defeated by reason of the misjoinder or nonjoinder of any party, and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.* (emphasis added)

A [35] Order 15 rule 4(1) RC allows the Plaintiffs to join all the defendants in This Suit without leave of the court if 2 cumulative conditions are fulfilled, namely:

(a) there is a common question of law or fact; and

(b) the Plaintiffs rights to relief in This Suit are in respect of or arise B out of the same transaction or series of transactions.

For the above proposition, I rely on the following 2 Court of Appeal cases:

(i) Chan Nyarn Hoi JCA judgment in *S Constantine v. Social Security Organisation (SOCSO) & Anor* [1998] 1 MLJ 160, at 163; and

C (ii) the decision of Abdul Malek Ahmad JCA (as he then was) in *Lembaga Arkitek Malaysia v. Cheah Kim Fah & Ors* [1999] 1 MLJ 669, at 679, 680.

[24] In *Mak Siew Wei v. Yeoh Eng Kong & Other Appeals* (*supra*) the plaintiff relied on the same series of facts and transactions (including the latest events D sought to be incorporated *vide* the re-amendment) to make claim in both capacities. The Court of Appeal in a judgment delivered by Nallini Pathmanathan JCA (now FCJ) endorsed the views expressed in *Ranjeet Singh Sidhu v. Zavarco Plc* as follows:

> [65] We should clarify at this juncture that it is not in every instance that E the rule against reflective loss precludes the joinder of a shareholder's personal action and a derivative action brought on behalf of the company in one claim. If indeed the causes of action are clearly pleaded correctly such that the claims *qua* shareholder are distinct and clearly separable from the relief sought in the derivative action, there ought, in principle, to be no objection or problem with both causes of action being brought in one F action. In short the clear separability of the causes of action and the reliefs such that the distinct nature of the claims is apparent, does not preclude a joinder. That was the case in *Zavarco*.

[25] Drawing support from the above two cases, this court finds there is nothing wrong in the instant proceedings for the plaintiff to bring both G personal action and leave application to commence a derivative action in the same OS as it is not in dispute that both claims predominantly revolves around the same facts, transactions and events. In addition, this will obviate the necessity of separate trials/hearings, save court resources particularly when the courts are heavily burdened, and costs.

H *Whether There Is A Reasonable Cause Of Action In The Plaintiff's Proposed Action Based On The Alleged Complaints?*

[26] Due to the proper plaintiff rule, for wrongs against the company, an aggrieved member has to show that that the wrongdoer(s) in control of the I company prevented the company from suing. The plaintiff in this case being a shareholder, has given *vide* letter dated 28 October 2020 produced as

exh. TEJ-7, 30 days' notice in writing ("the notice") to the first defendant as the director of the company of his intention to apply for leave of the court under s. 347 of the Act.

[27] An examination of the notice revealed that the thrust of it was mainly about the EGM of 14 May 2020 being illegally held ("the main complaint") and it was vague and general in terms of the first defendant's breaches of duties as a director. The said notice said nothing about the several cases against the company which the supporting affidavit evidence when analysed, in fact revealed boiled down to two cases – one a suit against the first defendant personally and the other, a small claim of RM5,000. Neither did the notice say anything about the financial statements not being circulated and/or lodged ("the two grievances").

[28] Applying 'the injury/remedy analytical framework' principles propounded in *Ho Yew Kong v. Sakae Holdings Ltd* (*supra*), it appears to me that the real injury the plaintiff seeks to vindicate is the wrong done to him in the main complaint – in the transfer of his shares at the so-called illegal EGM of 14 May 2020, which is not a wrong done to the company. The remedy in a derivative action sought by him will not in my utmost respectful view meaningfully vindicate such injury. The personal injury to him does not provide a sufficient basis for him to bring the matter within s. 348 of the CA 2016. I will deal with the main complaint separately.

[29] For the sake of completeness, I will add that for the two grievances, for a small claim of RM5,000, it really is for the management to consider whether it would be expedient or in the practical and commercial interests of the company to defend the matter. As for the alleged delay in circulation and lodgement of the financial reports posited to expose the company to potential fines, I note that the plaintiff's request for financial reports were made by letter and email dated 8 July 2021 and another letter dated 14 July 2021 as evident in exh. TEJ 8 after commencement of this proceeding. Clearly, the plaintiff has not shown as is incumbent on him so to do, that he had given the Board of Directors (notwithstanding the first defendant in this case is the sole director of the company) an opportunity to consider whether action ought to be taken against the wrongdoer in respect of the two grievances which are to be the basis of the derivative action. The plaintiff without doing so, had failed to put his foot into the door and such failure to show wrongdoer control prevented action from being taken is fatal and incurable. There is no case here that warrants further investigation in a full-blown derivative action. In addition, these are in reality mismanagement issues and not misconduct. The possibility of the company being fined remains speculative. A derivative action cannot be predicated on mismanagement as the case authorities make plain.

[30] Further, the court will not interfere with the internal management and affairs of a company. In *Burland v. Earle* [1902] AC 83 at p. 93, Lord Davey, when delivering the advice of the Privy Council expressed the proposition in the following words:

> It is an elementary principle of the law relating to joint stock companies that the court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so.

[31] In *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* [1996] 4 CLJ 716; [1996] 1 MLJ 113, the Federal Court stated:

> Traditionally, courts have been reluctant to interfere with matters relating to the internal management of incorporated companies. Through a series of decisions of the Court of Chancery in the mid-nineteenth century, they administered unto themselves a jurisdictional prohibition from entering upon domestic disputes between corporators. Two landmark decisions settled the law upon the subject for all time. The first of these was *Foss v. Harbottle* (1843) 67 ER 190; the second was *Mozley v. Alston* (1847) 41 ER 833.

[32] I hold that the application seeking leave to commence derivative action is incompetent and not properly constituted as the threshold is not met.

[33] Given my views that the application seeking leave failed on the preliminary threshold issue, it was unnecessary to deal with the substantive arguments on whether the prerequisites in s. 348(4)(a) and (b) of the Act were met.

[34] I now deal with the main complaint. At first blush, I must confess that it would have been convenient to slam the court's doors in the plaintiff's face and let him knock on the doors of another court in a separate suit. It will be convenient to do that but Lord Atkin in *General Council Of Medical Education And Registration Of The United Kingdom v. Spackman* [1943] 2 All ER 337, aptly commented at p. 341: "Convenience and justice are often not on speaking terms." Thus, looking at the matter from the wide-angle lens of justice, it is better for the administration of justice to dispose of the main complaint here.

[35] In my assessment of the affidavits pertaining to the OS, I have considered the approach of the Federal Court in *Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd* [1999] 2 CLJ 997 at pp. 1005 and 1006; [1999] 3 MLJ 81 per Edgar Joseph Jr FCJ:

> The Law on the approach of the Court of first instance in evaluating and resolving a conflict of evidence on affidavit was well captured by the Privy Council in *Eng Mee Yong v. Letchumanan* [1979] 2 MLJ 212 and in *Tay Bok Choon v. Tahansan Bhd.* [1987] 1 MLJ 433.

In the first of these cases – *Eng Mee Yong* – Lord Diplock delivering the advice of their Lordships of the Board said this (at p. 381 D):

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflict of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit **however equivocal, lacking in precision, inconsistent with undisputed contemporary document or other statements by the same deponent, or inherently improbable itself may be.**

In the second of these cases – *Tahansan* – Lord Templeman put the point more shortly and generally, thus:

> If allegations are made in affidavits by the petitioner and those allegations are **credibly denied** by the respondent's affidavits, then in the absence of oral evidence or cross examination, the judge must ignore the disputed allegation. (emphasis added)

[36] On the facts and based on the totality of the evidence before the court, I find there is merit to the plaintiff's complaint in respect of the personal wrong done to him whether the meeting of 14 May 2020 is an illegal EGM or a first-round bidding process as labelled by the parties. It is in my view improperly held for the following reasons.

[37] It is the defendants' case as stated in para. 21 of the affidavit in reply that a deadlock had arisen between the shareholders sometime in early 2020.

[38] Clause 11.1 and 11.2 of the SHA read as follows:

11. Deadlock Provisions

11.1 Application

This cause shall apply in case where:

(a) A matter relating to the affairs of the Company has been considered by a meeting of the Shareholders with a duly constituted quorum (including any Unresolved Matter which has been referred to the Shareholders for a resolution pursuant to Clause 6.4(d) and no resolution has been carried or a resolution has failed to be carried at such meeting of the Shareholders in relation to the matter; or

(b) the Shareholders cannot arrive at a unanimous approval on any Reserved Matters;

then any such case is hereinafter referred to as a "Deadlock".

For the purposes of this Clause 11.1, "Deadlock Notice" means a written notice sent by one of the Shareholders to the other Shareholders setting out the said disagreement and the need to resolve the same.

A 11.2 Resolution of Deadlock

(a) The Shareholders shall within sixty (60) days from the date the Deadlock Notice is issued attempt to reconcile their difference or otherwise enter into *bona fide* discussions with a view to resolving the Deadlock.

B First Round Bidding Process

(b) If the Shareholders shall be unable to agree on alternative means of dispute resolution, then and in any such event, any of the Shareholders shall be entitled to serve on the other Shareholder thirty (30) clear days' notice at the least, specifying the place in C Malaysia, day and hour where a bidding process will be conducted in the presence of the company secretary and the auditors of the Company to determine the highest price that a Shareholder would be willing to pay for the Shares of the other Shareholders.

(c) The bidding process shall begin with each Shareholder submitting to D the company secretary in the presence of all other Shareholders, its bid for all the Shares held by the other Shareholders. Upon receiving all bids, the company secretary together with the auditors shall verify the particulars of the bids received to identify the highest bid submitted. Once verified, the company secretary shall announce to all Shareholders, the highest bid submitted and the identity of E the Shareholder that submitted the highest bid. The company secretary shall also announce to all Shareholders, the particulars of the lower bids submitted by the other Shareholders and the identity of Shareholder corresponding with each bid.

(d) The party, as amongst the Shareholders, submitting the highest bid during the bidding process (the "Higher Bidder") shall be bound to F purchase all the Shares held by the other Shareholders at the price of the highest bid and shall make payment for the same not later than thirty (30) days from the date of the tender, failing which the provisions in Clause 11.2(g) shall be applicable. The remaining Shareholders submitting the lower bid during the bidding process G shall be bound to sell its Shares to the Higher Bidder at the price of the highest bid and shall transfer the same on receipt of payment.

(e) For the avoidance of doubt, if any Shareholder shall not be present during the bidding process or does not submit any bid, that Shareholder shall still be bound to sell its Shares to the Higher bidder at the price of the higher bid.

H Subsequent Round Bidding Process

(f) In the event more than one Shareholder submits the same highest bid, each of the Shareholders who submitted the same highest bid shall submit to the company secretary, a revised bid at higher price. I This process shall continue until there is one Shareholder who

submits the highest revised bid ("Highest Revised Bidder"). Once the highest revised bid is determined, the Highest Revised Bidder shall proceed to purchase Shares of all the other Shareholders in accordance with the provisions in Clause 11.2(d).

(g) With respect to Clause 11.2(d), in the event the Highest Revised Bidder does not make payment for the Shares within thirty (30) days from the date of the tender, the purchase of the Shares by the Highest Revised Bidder shall be deemed terminated on the day falling thirty (30) days after the date of the tender and the Shareholder who submitted the second highest bid shall be obliged to purchase the Shares of all the other Shareholders (including the Highest Revised Bidder) at the price representing the second highest bid and shall have thirty (3) days to pay the purchase consideration for the purchase of the Shares of all the other Shareholders.

[39] Significantly, for a notice to be issued under cl. 11.2(b) of the SHA to convene the first-round bidding process pursuant to an alleged deadlock situation under cl. 11 of the SHA, there must first be established a deadlock, which necessitate therefore, compliance of cl. 11.1(a) or (b), as well as cl. 11.2(a). The first defendant's notices calling for the 14 May 2020 meeting (exh. C and E) allegedly arose from a deadlock notice dated 9 February 2020 issued to the shareholders. For reasons only known to the first defendant, the deadlock notice was not produced.

[40] The primary issue of the right to call a meeting for the avowed purpose of the first-round bidding process was not only questioned by the plaintiff but by LSA Ventures Sdn Bhd (formerly known as Tune Plato Subhome Sdn Bhd) as made crystal clear in its letters in exhs. TEJ 9 and TEJ 10 which the first defendant had glaringly not addressed. The first defendant has not demonstrated compliance of cl. 11.1(a) or (b), as well as cl. 11.2(a) at all. *Sans* compliance with these clauses, in my utmost respectful view, the "deadlock" as defined in the SHA has not been proven on a balance of probability. As such, the deadlock notice dated 9 February 2020 culminating in the first defendant's notice calling for a meeting on 14 May 2020 for first round bidding were both utterly misconceived. Indeed, it is worth noting that counsel for the defendants when questioned during the hearing on what the dispute was all about that lead to a "deadlock", conceded he has no details.

[41] Furthermore, there is a paucity of evidence that all shareholders were given notice of the meeting. In exh. C, the defendants produced the notice dated 13 April 2020 addressed to LSA Ventures Sdn Bhd by hand/email or registered post. The notice was carbon-copied to the plaintiff and the other shareholder Pay Solution Technologies Sdn Bhd according to what appeared on the carbon copy notice itself to be sent by hand but not a single acknowledgment of receipt was produced for exh. C. The notice at exh. E

A addressed to the plaintiff was dated differently – it was dated 27 March 2020. The receipt "pengeposan" at p. 50 of the affidavit was completely illegible as to what date it was posted. At para. 24 of the defendants' affidavit in reply, the defendants averred that the plaintiff having alleged that he never received the notice had himself produced the notice at p. 128 of his affidavit. I have
B checked p. 128 of the plaintiff's affidavit in the court system – in truth, it refers to the first defendant's bid dated 14 May 2020 and not as alleged by the defendants.

[42] The first defendant's posit that LSA Ventures Sdn Bhd did not challenge the bidding process and has transferred its shares to the first
C defendant is incorrect as made plain by the contents of exhs. TEJ 9 and TEJ 10 wherein LSA Ventures questioned *inter alia* the propriety of the deadlock notice. The alleged transfer of shares, if true, is eyebrow raising as the SHA in cl. 5 contain pre-emption rights, but that is not relevant to the plaintiff's complaint in the instant proceedings. Suffice to say, that this assertion of the
D first defendant by itself, does not take the first defendant's case very far. The plaintiff as a signatory to the SHA is entitled to expect that all parties will honour the terms of the SHA.

[43] As the first defendant has not shown there was due process accorded, he is not entitled to call for the alleged first-round bidding process. I find the
E meeting on 14 May 2020 is premature and invalid. It follows that any action/decision taken thereat to the substantial prejudice of the plaintiff ought to be invalidated and struck down. The first defendant cannot therefore foist a sum of RM1,500 to expropriate all the plaintiff's shares without strictly complying with the SHA.

F **[44]** When the first defendant's counsel was asked in the course of hearing whether the plaintiff's shares have been transferred to the first defendant, he informed they were not. In compliance with the court's direction, the first defendant filed an affidavit affirmed on 9 December 2021 exhibiting a company search dated 19 November 2021 as confirmation that the plaintiff's
G shares remained intact.

[45] The OS contains a prayer 6 for 'other relief that this Honourable Court deems fit and just.' "Now these are not empty words" as Salleh Abbas FCJ observed in *Lim Eng Kay v. Jaafar Mohamed Said* [1982] CLJ 298; [1982] CLJ (Rep) 190; [1982] 2 MLJ 156.

H

[46] It is also settled law that this court is entitled to grant relief in equity in the circumstances of this case. See *Sinar Wang Sdn Bhd v. Ng Kee Seng* [2004] 3 CLJ 679 where Gopal Sri Ram, JCA (as His Lordship then was) said:

I

> … A Court of Equity exercises its jurisdiction not in a straight jacketed or inflexible fashion. The whole approach of equity to problems coming within its parameters is one of flexibility based on broad and general doctrines rather than strict and unyielding rules. This is the hallmark of equity and it is in this fundamental respect that equity differs and diverges from common law. Equitable remedies and doctrines are therefore flexible and adaptable to particular circumstances. The Court of Equity may therefore mould the relief that is to be granted on particular facts.

[47] In my judgment, the formulation in the plaintiff's OS quoted in para. 45 above is sufficient for the exercise of equitable jurisdiction.

[48] On the wide powers of the court to grant declaratory reliefs, I would like to refer to *Datuk Syed Kechik Syed Mohamed v. Government Of Malaysia & Anor* [1978] 1 LNS 44; [1979] 2 MLJ 101 at 107 where Lee Hun Hoe CJ Borneo said:

> The basis of the jurisdiction is O. 25 r. 5 of the Rules of the Supreme Court. The prevailing view seems to be that the court's jurisdiction to make a declaratory order is unlimited subject only to its own discretion.
>
> …
>
> In granting a declaration the court has to consider the utility of the declaration claimed and the usefulness of the declaration on the one hand as against the inconvenience and embarrassment that may result on the other hand. **As to the determination of future right its importance for certain purposes is not in doubt, particularly when a mere declaration is usually the only remedy.** (emphasis added)

[49] This court as such declares that the meeting held on 14 May 2020 whether called an EGM or as a first-round bidding process is invalid and the plaintiff is to return the sum of RM1,500 banked into the plaintiff's account to the first defendant within 14 days of this order. Prayers 1 to 4 of the OS are dismissed. The defendants are to pay the plaintiff costs of RM5,000 subject to allocator.